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IN THE SUPREME COURT
OF THE UNITED STATES
OCTOBER TERM, 1984

NATIONAL FARMERS UNION INSURANCE COMPANIES; and LODGE GRASS SCHOOL DISTRICT NO. 27,

Petitioners,

-v-

CROW TRIBE OF INDIANS; et al.,

Respondents.

BRIEF OF ELEVEN AMICI CURIAE STATES ON MERITS OF FIRST QUESTION AS TO WHICH THE PETITION FOR WRIT OF CERTIORARI WAS GRANTED.

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QUESTIONS AS TO WHICH THE PETITION FOR WRIT OF CERTIORARI WAS GRANTED

1. Whether there is a federal claim for relief against Indian tribal governments that unlawfully assert civil jurisdiction over non-Indians.

2. Whether the Tribal Court of the Crow Indian Reservation has jurisdiction over claims that involve the State of Montana (or its subdivisions), that arise on State-owned land, and that occur in connection with activities that are compelled or encouraged by State and Federal law or policy.

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BRIEF OF ELEVEN *AMICI CURIAE* STATES ON MERITS OF FIRST QUESTION AS TO WHICH THE PETITION FOR WRIT OF CERTIORARI WAS GRANTED.

The States of Alaska, Arizona, Idaho, Minnesota, Montana, New Mexico, North Carolina, Oklahoma, South Dakota, Wisconsin and Wyoming respectfully submit pursuant to Sup. Ct. R. 36.4, as *amici curiae*, a brief on the merits of the first issue as to which certiorari has been granted.

STATEMENT OF INTEREST

The amici curiae States submitted a brief in support of the petition for writ of certiorari in this matter, and the statement of interest set out therein remains accurate. Briefly restated, the amici States carry on various governmental functions within the exterior boundaries of many Indian reservations. Those functions necessitate continuing and diverse interaction between the amici States, tribes and tribal members on fee lands owned by nonmembers, including the States or their political subdivisions, and on lands owned by tribal members, tribes or the United States government in its trust capacity. Because of the degree and regularity of such interaction, protection of the amici States' interests

demands the availability of a federal forum to determine, when appropriate, the scope of tribal civil adjudicatory authority. The absence of federal question jurisdiction under 28 U.S.C. § 1331 (1966) will leave the amici States with no independent means of challenging such authority except when a tribal court judgment is sought to be enforced in state court against them. The amici States will thus have no protection against enforcement of tribal court judgments as to their property within the exterior boundaries of reservations--the situation presented in this matter.

SUMMARY OF ARGUMENT

The Court's modern analysis of tribal sovereignty rights has typically involved a comprehensive review of relevant federal treaties, statutes and

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executive branch policies. In none of these cases has the sovereignty issue been directly resolved by a particular treaty or statute, and the Court has therefore been required to engage in a careful balancing of tribal and federal interests. Through such analysis the Court has arrived at general principles, perhaps most fully summarized in Montana v. United States, 450 U.S. 544 (1981), which apply to determination of sovereignty issues, including resolution of civil adjudicatory jurisdiction questions. Such determinations thus entail an analysis which, while based in treaty and statutory construction, contains a substantial measure of judicially-created standards.

Because of the hybrid analytical nature of tribal sovereignty right determinations, the existence of a

federal question under 28 U.S.C. § 1331 may be justified under the federal common law doctrine or on more typical jurisdictional grounds. The unique federal interest in the rights of tribes, when joined with the virtually complete occupation of Indian law by federal principles, demands a federal rule of decision, and there is no statutory or other basis to preclude creation of such a common law right. Moreover, Oneida Indian Nation v. County of Oneida, 414 U.S. 661 (1974), clearly suggests that recognition of a federal common law claim under the circumstances herein is appropriate and that, in any event, federal question jurisdiction is present on traditional grounds because the Crow Tribe's sovereignty rights must be delineated through construction and application of federal treaties, statutes

and executive branch policies. Federal question jurisdiction should therefore be found. Finally, this brief does not address the question of whether the Crow Tribal Court did have jurisdiction over the petitioner Lodge Grass School District, but does suggest some considerations relevant to that issue and reflective of the federal question raised by the petitioners' amended complaint.

ARGUMENT

I. JURISDICTION MAY BE INVOKED UNDER THE FEDERAL COMMON LAW DOCTRINE WHEN "UNIQUELY FEDERAL RIGHTS" ARE INVOLVED WHOSE PROTECTION DEMANDS A UNIFORM FEDERAL RULE OF DECISION. MOREOVER, UNDER TRADITIONAL STANDARDS FEDERAL QUESTION JURISDICTION IS PRESENT WHEN THE PLAINTIFF'S CLAIM DEPENDS SIGNIFICANTLY UPON THE CONSTRUCTION AND APPLICATION OF FEDERAL TREATIES OR STATUTES.

The Court has outlined, in various cases, the broad parameters of the federal common law doctrine as it exists

subsequent to Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938). Recently in Texas Industries v. Radcliffe Materials, 451 U.S. 630 (1981), it was asked to create a federal common law right of contribution on behalf of a defendant, who had been assessed damages under the Sherman and Clayton Acts, 15 U.S.C. §§ 1 et seq. (1973), against other participants in the unlawful conspiracy. The Court initially observed:

> There is, of course, "no federal general common law."... Nevertheless, the Court has recognized the need and authority in some limited areas to formulate what has come to be known as "federal common law."... These instances are "few and restricted" ... and fall into essentially two categories: Those in which a federal rule of decision is "necessary to protect uniquely federal interests,"...and those in which Congress has given the courts the power to develop substantive law....

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Id. at 640 (citations omitted). With respect to the "unique federal interests" aspect of the federal common law doctrine, the Court stated that, "absent some congressional authorization to formulate substantive rules of decision, federal common law exists only in such narrow areas as those concerned with the rights and obligations of the United States, interstate and international disputes implicating the conflicting rights of States or our relations with foreign nations, and admiralty cases." Id. at 641. In such cases state law is inapplicable "either because the authority and duties of the United States as sovereign are intimately involved or because the interstate or international character of the controversy makes it inappropriate for state law to control." Ibid. While recognizing that a general

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federal interest existed in private enforcement of the antitrust laws, the Court concluded: "Notwithstanding that nexus contribution among antitrust wrongdoers does not involve the duties of the Federal Government, the distribution of powers in our federal system, or matters necessarily subject to federal control even in the absence of statutory authority...." Id. at 641 (citation omitted). See Northwest Airlines v. Transport Workers Union, 451 U.S. 77, 95 (1981).

The federal common law doctrine may further serve, as to unique areas of federal concern and regulation, "'to fill in interstitially or otherwise effectuate the statutory patterns enacted in the large by Congress." United States v. Little Lake Misere Land Company, 412 U.S. 580, 593 (1973). Importantly, moreover,

federal common law not only determines choice of law but also creates a substantive cause of action to which federal jurisdiction attaches. The Court has accordingly construed the term "laws" in 28 U.S.C. § 1331 to include claims based upon federal common law as well as those of statutory origin. Illinois v. City of Milwaukee, 406 U.S. 91, 100 (1972).

The federal common law doctrine is, therefore, an established means for insuring protection of particularly federal concerns through availability of a federal forum and application of such law as determined appropriate by that forum. This doctrine has obvious significance to Indian law generally, which developed from conceptualizing

tribes as "domestic dependent nations" [1/] subject to the plenary authority of the federal government [2/] and largely free from interference by the several states.[3/] The analogous nature of Indian law and international law is evident.[4/] Those considerations which warranted the Court's refusal to recognize a federal common claim in Texas Industries thus strongly militate toward the opposite result as to claims like the petitioners'.

1/ Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831); United States v. Kagama, 118 U.S. 375, 384-85 (1886).

2/ Lone Wolf v. Hitchcock, 187 U.S. 553, 564-65 (1903).

3/ Worchester v. Georgia, 31 U.S. (6 Pet.) 515, 561 (1832); Warren Trading Post v. Arizona Tax Comm'n, 380 U.S. 685, 690 (1965); White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 144-45 (1980).

4/ Washington v. Washington State Commercial Passenger Fishing Vessel

While the Court has not explicitly applied the federal common law doctrine in an Indian law context, Oneida Indian Nation v. County of Oneida, supra, underscores the uniquely federal nature of Indian rights and lays an analytical foundation for implication of that doctrine herein as well as for jurisdiction under traditional federal question criteria. In Oneida, jurisdiction under 28 U.S.C. §§ 1331 and 1362 was found as to a complaint alleging that a 1795 cession of tribal land to the State of New York was ineffective because of noncompliance with the Nonintercourse Act, 1 Stat. 137 (1790), and because such cession was "for an unconscionable and

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(Footnote Continued)
Ass'n, 443 U.S. 658, 675 (1979). See, also, Tenneco Oil Co. v. Sac & Fox Tribe, 725 F.2d 572, 575 (10th Cir. 1984).

inadequate price." 414 U.S. at 664-65. Reversing the Court of Appeals' dismissal of the complaint for lack of jurisdiction, the Court first noted that the Oneida Nation's right to possession of the ceded lands "was plainly enough alleged to be based on federal law" since, "[g]iven the nature and source of possessory rights of Indian tribes to their aboriginal lands, particularly when confirmed by treaty, it is plain that the complaint asserted a controversy arising under the Constitution, laws or treaties of the United States within the meaning of both section 1331 and 1362." Id. at 666, 667.

The Court then reviewed the development of the "Indian title" doctrine under which title to tribal lands "is a matter of federal law and can be extinguished only with federal

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consent." Id. at 670. Tracing the use of such doctrine with respect to New York tribes, the Court cited with approval United States v. Forness, 125 F.2d 928 (2d Cir.), cert. denied, 316 U.S. 694 (1942), where state law was held inapplicable to an action brought by the United States to set aside certain reservation leases for nonpayment of rent and which concluded, as summarized by the Court, that, "absent federal statutory guidance, the governing rule of decision would be fashioned by the federal court in the mode of the common law." Id. at 674 (footnote omitted). Nonetheless, rather than explicitly resting federal jurisdiction on implication of a federal common law cause of action, the Court reasoned that the action fell within the "well-pleaded complaint" rule of, inter alia, Taylor v. Anderson, 234 U.S. 74

(1914), because "the right to possession itself is claimed to arise under federal law in the first instance" and because the complaint satisfied "the additional requirement formulated in some cases" that the claim present a dispute over the construction or effect of federal law, since (1) the Oneidas asserted a right to present occupancy "based in part on their aboriginal right of occupancy which was not terminable except by act of the United States," and (2) they asserted a claim under the Nonintercourse Act "which put in statutory form what was or came to be the accepted rule--that the extinguishment of Indian title required the consent of the United States." Id. at 677, 678.[5/]

[5/] The Second Circuit Court of Appeals subsequently determined in Oneida that a federal common law claim to recover

Following Oneida, the Court again confronted a choice of law issue, similar to that involved in implication of a federal common law right of action, in Wilson v. Omaha Indian Tribe, 442 U.S. 653 (1979). Wilson presented the question of whether a tribe was entitled to possession of a land affected by avulsive movements of the Missouri River. As originally established, the Omaha Reservation was bounded on the east by

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(Footnote Continued)
damages for wrongful possession of tribal land does exist. Oneida Indian Nation v. County of Oneida, 719 F.2d 525, 530 (1983), cert. granted, 104 S. Ct. 1590 (1984). The court of appeals stated that "[t]he interrelationship of the Indian nations and the United States -- including its constituent states -- early in the new nation's history was recognized as involving uniquely federal interests." Ibid. Its holding was in part based on this Court's favorable reference to United States v. Forness, supra, and that decision's application of federal common law.

the Missouri River but, because of riverbed changes, land originally part of the reservation now rested on the east side of the river. The Court distinguished the Omahas' rights from those of non-Indian federal grantees because, citing Oneida, "the Indians' right to the property depends on federal law, 'wholly apart from the application of state law principles which normally and separately protect a valid right of possession.'..." Id. at 670. The Court nonetheless held that, while federal law governed, resort to uniform federal principles was unnecessary since (1) no uniform national rule to determine whether riparian changes were avulsive or accretive was required; (2) little likelihood of injury to federal trust responsibilities or tribal possessory interests existed if state law was

equitably applied by federal courts; and (3) states possessed a substantial interest in having their own laws resolve such controversies. Id. at 673-74. Thus, although the Court determined that the rule of decision should be supplied by state law, it carefully assured the availability of a federal forum to interpret and apply such law.

Oneida and Wilson underscore the unique nature of Indian possessory rights to land and provide a clear basis for implication of a federal common law cause of action with respect to determination of such rights. Oneida, moreover, sets forth a more traditional analysis of federal question jurisdiction, and that analysis has obvious application herein. As developed below, the scope of tribal sovereignty rights is, like tribal possessory rights to land, a unique

matter of federal concern and is, again like tribal possessory rights to land, fashioned with reference to, inter alia, federal treaties and statutes. Oneida and Wilson, when viewed with the federal common law doctrine, provide not only an analytical framework for resolving the federal question issue herein but also strongly suggest the presence of such jurisdiction.

II. THE SCOPE OF TRIBAL SOVEREIGNTY HAS UNIFORMLY BEEN DETERMINED ON THE BASIS OF FEDERAL TREATIES, STATUTES AND EXECUTIVE BRANCH POLICIES, AND THE AMENDED COMPLAINT THUS PRESENTS A FEDERAL QUESTION UNDER THE "WELL-PLEADED COMPLAINT" RULE. THE COURT'S DECISIONS FURTHER REFLECT THE UNIQUELY FEDERAL NATURE OF TRIBAL SOVEREIGNTY RIGHTS AND THE NEED FOR A FEDERAL RULE OF DECISION TO DETERMINE THEIR SCOPE, THEREBY WARRANTING IMPLICATION OF A FEDERAL COMMON LAW CAUSE OF ACTION EVEN IF SECTION 1331 JURISDICTION WERE ABSENT UNDER TRADITIONAL STANDARDS.

In finding federal question jurisdiction under 28 U.S.C. § 1331, the

District Court below stated that the amended complaint "places at issue the extent of tribal court civil jurisdiction over non-Indians developed by the Supreme Court in Montana v. U.S...--developments that are not drawn from any specific statute or treaty, but raise the overriding federal interest in determining the extent of tribal sovereignty and therefore form part of federal common law." (Petition at 17a.) The Court of Appeals, however, distinguished Montana v. United States, supra, because: (1) Jurisdiction for that action was expressly based on 28 U.S.C. § 1345 (1976) and (2) "Montana involved limitations of an Indian tribe's regulatory jurisdiction,..." (Id. at 6a.) It then refused to imply a federal common law claim, citing Milwaukee v. Illinois, 451 U.S. 304 (1981), for the principle

that "recognition of a cause of action arising from federal common law is an unusual course to be approached cautiously" and Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978), for the notion that Congress intended "to limit intrusion of federal courts upon tribal adjudication." (Id. at 7a.) The Court apparently did not consider whether jurisdiction was present under the more traditional federal question analysis of Oneida or like decisions. While the Court of Appeals' preemptory reasoning perhaps resulted from the absence of challenge to federal question jurisdiction by the respondents, it nonetheless reflected an insensitivity to this Court's decisions beginning, most notably, with Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978), which have defined the scope of tribal

sovereignty rights in varied situations. These decisions not only establish clearly the federally-controlled nature of the required sovereignty analysis but also the treaty and statutory basis of that analysis.

In Oliphant v. Suquamish Indian Tribe, supra, the Court held, in the context of a habeas corpus proceeding, that a nonmember could not be criminally prosecuted under a tribal code. It rejected the tribe's argument that authority over nonmembers derived from retained, inherent powers of government, reasoning that, while "Indian tribes do retain elements of 'quasi-sovereign' authority after ceding their lands to the United States and announcing their dependence on the Federal Government..., the tribe's retained powers are not such that they are limited only by specific

restrictions in treaties or congressional enactments.... Indian tribes are prohibited from exercising both those powers of autonomous states that are expressly terminated by Congress and those powers 'inconsistent with their status'...." 435 U.S. at 208 (citations omitted; emphasis in original). The Court then concluded that exercise of criminal jurisdiction over non-Indians was inconsistent with such dependent status because the "power of the United States to try and criminally punish is an important manifestation of the power to restrict personal liberty" and, "[b]y submitting to the overriding sovereignty of the United States, Indian tribes therefore necessarily gave up their power to try non-Indian citizens of the United States, except in a manner acceptable to the Congress." Id. at 210.

Significantly, Oliphant's holding, like those in later sovereignty cases, was reached only after a subtle and detailed analysis of varied treaties, federal statutes, executive branch policies and judicial decisions which, in the aggregate, form "Indian law." Id. at 206. The decision thus traced the development of tribal court systems generally; the "relatively new phenomenon" of attempted assertion of criminal jurisdiction over non-Indians; the early congressional, executive and judicial assumption that such jurisdiction did not exist; and the Treaty of Point Elliot involving the Suquamish Tribe itself. This form of analysis is distinctive in American jurisprudence and underscores the unique relationship between Indian tribes and the federal government -- a relationship

whose legal nuances can be captured only through a sensitive treatment of changing legislative and executive approaches to particular Indian issues.

Less than a month after Oliphant, the Court again addressed the scope of inherent tribal sovereignty. In Wheeler v. United States, 435 U.S. 313 (1978), it found no violation of the Double Jeopardy Clause when a Navajo member, who had been convicted of certain offenses under the Navajo Tribal Code, was later prosecuted in federal court on the basis of the same transaction. The Court considered controlling the question of whether the power of the Navajo Tribe to punish the criminal conduct of its members derived from the tribe's inherent sovereignty or from delegation by Congress. Id. at 322. In determining that such power was inherent, the Court reviewed the treaties

executed between the tribe and the United States, 18 U.S.C. § 1152 (1966), which recognizes the right of tribes to prosecute their members, and general decisionally-based limitations on Indian sovereignty which rest "on the fact that the dependent status of Indian tribes within our territorial jurisdiction is necessarily inconsistent with their freedom independently to determine their external relations." Id. at 328. "Internal criminal laws," however, were viewed differently because "[t]hey involved only the relations among members of tribe." Ibid. Wheeler's importance to the jurisdictional issue herein is the quality and nature of its reasoning, which resolved a difficult, elusive question by reference to that complex of treaties, statutes and decisional authority constituting "Indian law."

A tribe's authority as to consensual, on-reservation purchases by nonmembers was a principal issue in Washington v. Confederated Tribes of Colville, 447 U.S. 134 (1980). The Court rejected the State of Washington's challenge to that authority, noting: "Executive branch officials have consistently recognized that Indian tribes possess a broad measure of civil jurisdiction over the activities of non-Indians on Indian reservation lands in which the tribes have a significant interest...including jurisdiction to tax" and that "[f]ederal courts have also acknowledged tribal power to tax non-Indians entering the reservation to engage in economic activity." Id. at 152-53 (citations omitted). The Court then stated that "[t]ribal powers are not implicitly divested by virtue of the

tribes' dependent status" but that "such a divestiture [has been found] where the exercise of tribal sovereignty would be inconsistent with the overriding interests of the National Government." Id. at 153. Implicit in the "overriding National Government interests" standard is, of course, a balancing of tribal and federal interests, as reflected through the constitution, treaties, statutes, executive branch policies and decisional authority.

In Montana v. United States, supra, the attempted assertion of control by the Crow Tribe over nonmember hunting and fishing on, inter alia, fee land owned by nonmembers was held outside the Tribe's sovereignty rights. The Court initially rejected the Ninth Circuit's reliance on the Fort Laramie Treaty of 1868 as basis for the authority claimed by the Tribe,

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reasoning that, while the treaty provided for lands to be "set apart for the absolute and undisturbed use and occupancy of the Indians," the Tribe was impliedly not given authority over lands not subject to such exclusive use and occupancy. 450 U.S. at 558-59. The Court further rejected the court of appeals' conclusion concerning the effect of the General Allotment Act of 1887, 24 Stat. 1388, and the Crow Allotment Act of 1920, 41 Stat. 751, and stated that, after review of the legislative and executive assimilation policy underlying those statutes, "[i]t defies common sense to suppose that Congress would intend that non-Indians purchasing allotted lands would become subject to tribal jurisdiction when an avowed purpose of the allotment policy was the ultimate

destruction of tribal government." Id. at 599 n.9.

The Court further held that the Tribe's inherent authority was "not so broad" as to support hunting and fishing regulation of nonmembers on nontribal fee lands. It stated that such authority had normally been limited to matters of internal concern involving tribal members, and that "the exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation." Id. at 564 (citations omitted). Regulation of hunting and fishing by nonmembers on nontribal land, however, was then characterized as having "no clear relationship to tribal self-government or

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internal relations." Ibid. Most importantly for present purposes, the Court noted that tribes may retain "inherent sovereign powers to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands," citing as examples activity by nonmembers who have entered into a consensual relationship with the tribe or its members and activity of nonmembers which "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." Id. at 566 (citations omitted; emphasis added). The Court found no consensual relationship and no threat to the Tribe's political or economic

security with respect to the nonmembers' hunting and fishing.[6/]

Montana thus continued the analytical methodology used in prior decisions to determine the scope of

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[6/] The Court's reference to "civil jurisdiction" is, in itself, sufficient to vitiate the Court of Appeals' distinction below between "regulatory" and "adjudicatory" jurisdiction. (Petition at 6a-7a.) Indeed, two decisions cited by the Court in Montana for the "direct effect" test, Fisher v. District Court, 424 U.S. 382 (1976), and Williams v. Lee, 358 U.S. 217 (1959), upheld the exclusivity of tribal court proceedings and involved no "regulatory" aspects. Judge Wright's remark in his dissent that the majority's "distinction cannot be found in the cases and rests upon a strained reading of their facts" is clearly well-taken. Realistically viewed, such distinction derived not from a reasoned analysis of this Court's decisions but from prior Ninth Circuit holdings recognizing federal common law jurisdiction over claims, in a "regulatory" context, that tribal sovereignty rights have been exceeded. Babbitt Ford v. Navajo Indian Tribe, 710 F.2d 587, 591 (1983), cert. denied, 104 S. Ct. 1707 (1984); Cardin v. De La Cruz, 671 F.2d 363, 365, cert. denied, 459 U.S. 967 (1982).

tribal sovereignty. That methodology requires discrete analysis not only of the treaties, statutes and executive policies directly relevant to the tribal-federal government relationship at issue but also of more general concepts of tribal sovereignty whose basic parameters have been articulated through earlier cases. The methodology was most recently applied in Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982), where the validity of a tribal oil and gas tax on nonmember lessee producers was sustained. The tribe's power to tax was found to be "an essential attribute of Indian sovereignty because it is a necessary instrument of self-government and territorial management...[and] derives from the tribe's general authority, as sovereign, to control economic activity within its

jurisdiction, and to defray the cost of providing governmental services by requiring contributions from persons or enterprises engaged in economic activities within that jurisdiction." Id. at 137 (citation omitted). The Court premised this conclusion on longstanding executive and legislative recognition of tribal taxation authority. Id. at 139-41.

The Court's decisions from Oliphant through Merrion unequivocally establish that determination of the scope of tribal sovereignty turns on a close analysis of relevant treaties, statutes and executive branch policies. Thus, in this matter the scope of the Crow Tribal Court's authority must be resolved by considering issues such as: (1) whether the 1868 Fort Laramie Treaty provides any basis for the asserted jurisdiction or, if as

in Montana, that treaty, when considered in pari materia with the 1887 General Allotment Act and the 1920 Crow Allotment Act, evinces an intent generally to limit tribal civil jurisdiction to members; (2) relevant executive branch policies or regulations as to the scope of tribal court civil jurisdiction;[7/] (3) whether, in view of general sovereign immunity principles, the Tribe's dependent status

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7/ The civil jurisdiction of Courts of Indian Offenses has generally been limited to disputes between tribal members or disputes between tribal members and nonmembers "brought before the courts by stipulation of both parties." 25 C.F.R. § 11.22 (1984). Although the Crow Tribe, through implementation of its own tribal court system, displaced its Court of Indian Offenses (25 C.F.R. § 11.1(d)), a similar limitation on jurisdiction existed as to the prior Crow court. 25 C.F.R. § 11.22C. Thus, as in Montana with respect to hunting and fishing regulation, there appears no established history of tribal court jurisdiction over nonmembers absent consent.

is consistent with investing it with the power to adjudicate claims against a political subdivision of the state without such subdivision's consent and without the availability of federal review as to the merits of such adjudication;[8/] and (4) whether, as the

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[8/] At common law states and their political subdivisions were immune from liability for tortious conduct by their employees, although a liability distinction was sometimes drawn, with respect to municipal corporations, between "governmental" and "proprietary" functions. See generally, T. Cooley, Law of Torts, §§ 72, 388 (4th ed. 1932); F. Harper & F. James, Law of Torts §§ 29.4-29.6 (1956). Even if the governmental and proprietary distinction was recognized for present purposes, the activity relating to the injury was governmental. There has been, in this regard, no contention by the respondents that Montana statutes permitting state court actions for tortious conduct by state and local government employees constitutes waiver of sovereign immunity for tribal court purposes. See §§ 2-9-102, 2-9-311, MCA; cf. State Peretti, 661 F.2d 756, 758 (9th Cir. 1981), (per curiam) (state may waive immunity as to state court actions

district court concluded below, Montana's "direct effect" test governs determination of this case. While not exhaustive of the factors which may be deemed material, each of the above issues is directly concerned with the interpretation and application of federal treaties, statutes, executive branch policies or decisional law and represents the nature of the inquiry essential to determining the scope of the Tribal Court's jurisdiction herein.[9/]

(Footnote Continued)
without waiving Eleventh Amendment immunity in federal courts).

[9/] The Court of Appeals' conclusory assertion below that implication of a federal common law claim would interfere with the Tribe's self-government rights under the Indians Civil Rights Act of 1968, 25 U.S.C. § 1301 et seq. (1983) ("ICRA"), begs the central question. The issue is whether the asserted right of self-government exists and, whatever else the ICRA may stand for, it is manifestly not intended to preclude federal

In sum, the petitioners' complaint clearly presents a federal question ripe for adjudication under 28 U.S.C. § 1331 because at its core lies petitioner Lodge Grass School District's claimed right to be free from tribal court jurisdiction absent consent. Cf. Shaw v. Delta Air Lines, 103 S. Ct. 2890, 2899 n.14 (1983) (§ 1331 jurisdiction present as to claim that state regulation was preempted by federal law). The precise contours of the alleged right must be traced with reference to federal treaties, statutes

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(Footnote Continued)
determination of that issue. In relevant part, the ICRA imposes certain obligations on tribes which had previously not existed and provides, as construed by Santa Clara Pueblo v. Martinez, supra, for highly restricted review of whether those rights have been violated. There is nothing in the ICRA or Santa Clara which indicates the statute was designed to broaden the substantive scope of tribal governance rights existing as of its enactment.

and executive branch policies, as construed by the Court in various decisions. Clearly, the petitioners' claim that the Lodge Grass School District, under the facts presented, has a federal right against nonconsensual assertion of Tribal Court jurisdiction "cannot be said to be so insubstantial, implausible, foreclosed by prior decisions of this Court, or otherwise completely devoid of merit as not to include a federal controversy within the jurisdiction of the district court, whatever may be the ultimate resolution of the federal issues on the merits." Oneida Indian Nation v. County of Oneida, 414 U.S. at 666-67. The petitioners' claim also undeniably involves a matter of unique federal concern, is incontrovertibly controlled by federal law, demands the availability of a

federal forum for its adjudication and is therefore appropriate for treatment under the federal common law doctrine.

CONCLUSION

The amici curiae States respectfully request that the Court find federal question jurisdiction under 18 U.S.C. § 1331 as to the petitioners' complaint and reverse the Court of Appeals' determination on that issue.

Respectfully submitted January, 1985.

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PETITIONER'S

BRIEF

Office-Supreme Court, U.S.
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JAN 18 1985
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No. 84-320

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

NATIONAL FARMERS UNION INSURANCE COMPANIES; AND LODGE GRASS SCHOOL DISTRICT NO. 27,

Petitioners,

v.

CROW TRIBE OF INDIANS; LEROY SAGE, A MINOR; FLORA NOT AFRAID, HIS GUARDIAN; THE TRIBAL COURT OF THE CROW INDIAN RESERVATION; EDDIE ROUNDFACE, GLEN BIRDINGROUND, AND IRA LEFTHAND, JUDGES OF THE TRIBAL COURT OF THE CROW INDIAN RESERVATION; CROW INDIAN TRIBAL COUNCIL; AND DONALD STUART, CHAIRMAN OF THE CROW INDIAN TRIBAL COUNCIL,

Respondents.

On Writ Of Certiorari To The United States Court of Appeals For The Ninth Circuit

BRIEF FOR PETITIONERS

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QUESTIONS PRESENTED FOR REVIEW

1. Whether there is a federal claim for relief against Indian Tribal Governments that unlawfully assert civil jurisdiction over non-Indians.
2. Whether the Tribal Court of the Crow Indian reservation has jurisdiction over claims that involve the state of Montana (or its subdivisions), that arise on state owned land, and that occur in connection with activities that are compelled or encouraged by state and federal law or policy.

PARTIES TO THE PROCEEDINGS BELOW

The petitioners are the Lodge School District No. 27 and its insurer, National Farmers Union Insurance Companies. These parties were the plaintiffs in No. CV-82-230-BLGS, which was the original proceeding brought in the United States District Court for the District of Montana, Billings Division and were the respondents in No. 83-3606 the appeal of said action before the United States Court of Appeals for the Ninth Circuit. The respondents, all defendants in No. CV-82-230 and appellants in the subsequent Ninth Circuit Court of Appeals case, are: CROW TRIBE OF INDIANS; LEROY SAGE, A MINOR; FLORA NOT AFRAID, HIS GUARDIAN; THE TRIBAL COURT OF THE CROW INDIAN RESERVATION; EDDIE ROUNDFACE, GLEN BIRDINGROUND, AND IRA LEFTHAND, JUDGES OF THE TRIBAL COURT OF THE CROW INDIAN RESERVATION; CROW INDIAN TRIBAL COUNCIL; AND DONALD STUART, CHAIRMAN OF THE CROW INDIAN TRIBAL COUNCIL.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-320

NATIONAL FARMERS UNION INSURANCE COMPANIES: AND LODGE GRASS SCHOOL DISTRICT NO. 27,

Petitioners,

v.

CROW TRIBE OF INDIANS; LEROY SAGE, A MINOR; FLORA NOT AFRAID, HIS GUARDIAN; THE TRIBAL COURT OF THE CROW INDIAN RESERVATION; EDDIE ROUNDFACE, GLEN BIRDINGROUND, AND IRA LEFTHAND, JUDGES OF THE TRIBAL COURT OF THE CROW INDIAN RESERVATION; CROW INDIAN TRIBAL COUNCIL; AND DONALD STUART, CHAIRMAN OF THE CROW INDIAN TRIBAL COUNCIL,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the Ninth Circuit Court of Appeals is reported at 736 F.2d 1320 (1984) and is reproduced in the Appendix to the Petition at 1a. The opinion of the District Court for the District of Montana is reported at 560

F.Supp. 213 (1983) and is also reproduced in the Appendix to the Petition.

JURISDICTION

The judgment of the Court of Appeals was entered on July 3, 1984. The Petition for Certiorari was timely filed with this Court on August 29, 1984. This Court granted certiorari as to both questions presented for review. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1)(1982).

2-9-316 MCA. JUDGMENTS AGAINST GOVERNMENTAL ENTITIES EXCEPT STATE. A political subdivision of the state shall satisfy a final judgment out of funds that may be available from the following sources:

(1) insurance;

(2) the general fund or any other funds legally available to the governing body;

(3) a property tax, othewise properly authorized by law, in an amount necessary to pay any unpaid portion of the judgment, except that such levy may not exceed 10 mills;

I. FEDERAL STATUTE

28 U.S.C. see 1331 provides in relevant part for jurisdiction in the Federal Courts over Civil Cause of Action that arise "under the constitutional laws, or treaties of the United States."

II. STATE STATUTES

MONTANA CODE ANNOTATED [HEREINAFTER MCA]:

(4) proceeds from the sale of bonds issued by a county, city, or *school district* for the purpose of deriving revenue for the payment of the judgment liability. The governing body of a county, city, or school district is hereby authorized to issue such bonds pursuant to procedures established by law. Property taxes may be levied to amortize such bonds, provided the levy for payment of any such bonds or judgment may not exceed, in the aggregate, 10 mills annually.

2-9-318 MCA. ATTACHMENT AND EXECUTION. No levy of attachment or writ of execution shall issue against any property of a governmental entity for the security or collection of any claim or judgment against any governmental entity under Parts 1 through 3 of this matter.

STATEMENT OF THE CASE

This case involves the question of whether the United States District Court for the District of Montana properly entertained jurisdiction pursuant to 28 U.S.C. §1331 to determine under the facts of the case at bar whether the Tribal Court of the Crow Indian Reservation unlawfully asserted civil jurisdiction over a political subdivision of the State of Montana in a tort case.

The controversy arose on May 27, 1982, when Leroy Sage, a minor enrolled member of the Crow Tribe of Indians was injured during a school day on the premises of an elementary school operated by Lodge Grass School District No. 27, which is a political subdivision of the State of Montana. The situs of the accident was on land owned by the State of Montana, with a mineral reservation therein held by the Crow Tribe. The land was sold to

Montana pursuant to the *Crow Allotment Act* of 1920 §16, which contains the following requirement:

> Provided further, that the Crow Indian children shall be permitted to attend the public schools of said state on the same condition as the children of white citizens of said state.

Kappler, *Indian Affairs: Laws and Treaties*, Vol. IV, p 277 (1928).

The undisputed facts of Leroy Sage's injuries and initial lawsuit are these as shown in the Excerpt of Record, filed with the 9th circuit Nos. 5, 13 & 24 [hereinafter "R"].

(a) Mr. Sage was struck by an uninsured motorcyclist on the school parking lot while returning from a school-sponsored activity;

(b) Mr. Sage suffered a broken leg for which medical bills, presently incurred and expected in the future, would total $3,000.00;

(c) Upon being contacted by Sage's attorney, the School District notified its insurer (National Farmers) of a claim by said attorney;

(d) As the adjuster for said insurer was investigating the claim, Sage, through his guardian, Flora Not Afraid, brought suit against the School District in Crow Tribal Court. The suit sought an award of $153,000.00 in damages ($150,000.00 pain and suffering, $3,000.00 actual and estimated total future medical expense);

(e) Process for the Tribal Court action was served by Dexter Falls Down on Wesley Falls Down, School Board Chairman for Lodge Grass School District No. 27. Wesley Falls Down utterly failed to notify the principal, secretary, superintendent or any other School District personnel or the District's insurer that suit had been filed and process accomplished;

(f) Because no one notified the carrier (National Farmers) of the pendency of the action, no preparation was possible for any defense of the Tribal Court lawsuit, and twenty-one days after service was made on Wesley Falls Down, the Tribal Court, without any notice having been given to the School District or to its insurer, entered a default judgment for the sum of $153,000.00 or the full prayer of the Tribal Court complaint.

Following these events, the School District and its insurer agreed to and did seek injunctive relief from the United States District Court for the District of Montana. They presented the above-stated facts to the Court in affidavits. Respondents, and all of them, brought forth not a single fact to rebut the facts of this case.

Judge James F. Battin issued a permanent injunction against all individual respondents to the effect that they were barred from attempting to enforce the default Tribal Court judgment. He did not rule upon Petitioner's claims of unconstitutional treatment (expressly leaving those issues for future resolution) but followed this Court's rule established in *Montana v. United States*, 450 U.S. 544 (1981), after finding he was empowered to invoke that rule pursuant to 28 U.S.C. §1331. In conducting the *Montana*, *supra*, analysis, Judge Battin held that since the tort at issue herein did not involve a consensual commerical transaction, the propriety of Tribal Court authority over the State of Montana would depend on whether Federal Court denial thereof would threaten the political integrity, the economic security, or the health or welfare of the Tribe as a whole. He concluded it did not and issued the injunction which Respondents appealed to the Ninth Circuit Court of Appeals.

The Ninth Circuit reversed Judge Battin and held that since a Tribal Court was the first and last arbiter of its own jurisdiction, 28 U.S.C. §1331 could never empower a Federal Court to intrude upon adjudicatory jurisdiction asserted by Tribal Courts even in civil tort actions involving non-Indians and arising upon non-Indian lands located within the boundaries of Indian reservations. The Ninth Circuit, however, envisioned that Sage would seek to enforce his Tribal Court judgment in State Court.

This did not occur, and without notice, the Tribal Court, upon application of Sage's attorney, authorized a surprise seizure of School District property to satisfy the Tribal Court judgment. Petitioners then applied for an emergency stay of the planned Tribal Court auction of said property, and such a stay was granted by Justice Rehnquist just as the sale was set.

Justice Rehnquist wrote an opinion extending the stay through the course of the instant appeal. He specifically left resolution of the question of a supersedeas bond demanded by Respondents, Sage and Not Afraid, to Judge Battin who ruled a bond was not required and that the seized property was to be returned to the School District on or before December 15, 1984. As this is written, Respondents continue to disobey Judge Battin's order, and contempt proceedings are underway.

SUMMARY OF ARGUMENT

The ability of States to conduct their governmental mandates in orderly fashion is at stake in this matter.

Local government is limited historically by constraints imposed upon it by State Constitutions and the highest law of the land, the United States Constitution. The

Ninth Circuit Court of Appeals in its opinion below has rendered history nugatory.

The Ninth Circuit fundamentally erred in holding that *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49 (1977), (involving as it did an intra-tribal dispute) makes a Tribal Court the first and last arbiter of its own jurisdiction in tort cases involving State owned land and State-run activity. Questions of the existence and extent of Indian Tribes' jurisdiction over non-Indians involves a careful examination of Tribal sovereignty and the extent to which that sovereignty has been divested. That analysis demands detailed study of relevant statutes, treaties, and that area of federal case law dealing with Indian Tribes and their relations with other entities. That analysis is no different for questions concerning Tribal adjudicatory and Tribal regulatory assertions of authority over non-Indians. The study of such questions is not governed by any single federal statute, but is based on federal common law. A claim based on such federal common law is included in "laws" of the United States for purposes of federal jurisdictions under 28 U.S.C. sec. 1331. *Illinois* v. *City of Milwaukee*, 406 U.S. 91 (1972) stands for the unassailable proposition that Petitioners stated a claim for federal judicial recognition of a cause of action arising under federal common law. The district court properly entertained jurisdiction pursuant to 28 §1331 U.S.C., to hear petitioner's cause of action. The Ninth Circuit perhaps more than any circuit court of appeals, has correctly recognized that cases challenging tribes' exercise of jurisdiction over non-Indians involves questions of Indian Sovereignty and are therefore subject to section 1331 jurisdiction. The district court also properly utilized this Court's holding in *Montana* v. *United States*, *supra*, to determine that under the facts in this case, the assertion

by the Crow Tribal Court of jurisdiction over a political subdivision of the State of Montana was not necessary to protect inherent Tribal sovereignty. Petitioners argue, moreover, that allowing the instrusion of the Tribal Court's asserted jurisdiction over a State Public School District would destroy the ability of the State of Montana to provide equal educational opportunities to Crow Indian children residing within the boundaries of the Lodge School District No. 27.

ARGUMENT

I. Tribal Court Judgments are Subject to Federal Court Review for Claims of Jurisdictional Excess.

A. The Ninth Circuit Erred in Holding That There Is Not A Federal Right of Relief for Non-Indians Claiming Abuse of Tribal Court Jurisdiction.

In the instant case [hereinafter, "*National Farmers Union Insurance*"], the Ninth Circuit court recognized that federal courts (including the Ninth Circuit itself) have appropriately decided questions of whether a tribe has exceeded its jurisdiction over non-Indians, citing *Babbitt Ford, Inc. v. Navajo Indian Tribe*, 710 F.2d 587, 591 (9th Cir. 1983), *cert. denied*, ___ U.S. ___, 104 S. Ct. 1707 (1984); and *Cardin v. De La Cruz*, 671 F.2d 363, 365, *cert. denied*, 459 U.S. 967 (1982). *National Farmers Union Insurance* (Pet. App. 5a–6a). There is no federal statute defining the extent of tribal jurisdiction over non-Indians, yet the Ninth Circuit acknowledged that federal jurisdiction for such questions exists under 28 U.S.C. §1331,[1] based on principles and questions of federal common law. However, the Ninth Circuit sought to avoid its own previous recognition of federal question jurisdiction over challenges by non-Indians to tribal authority by saying that the cases recognizing such jurisdiction only dealt with challenges to tribal regulatory jurisdiction. The court noted that such federal court jurisdiction was an "unusual course, to be approached [so] cautiously" as to exclude the review of questions of whether a tribe has abused its adjudicatory jurisdiction. *National Farmers Union Insurance* (Pet. App. 7a), quoting *Milwaukee v. Illinois*, 451 U.S. 304, 312–14 (1981).

The limitation on federal question jurisdiction to causes of action arising from federal common law for tribal abuses of regulatory jurisdiction as opposed to tribal abuses of adjudicatory jurisdiction is based on a distinction made from whole cloth by the Ninth Circuit, and not recognized elsewhere. It is a distinction that would create unbridled power in tribal courts to issue judgments, whether or not the tribal courts have jurisdiction to do so, even while subjecting tribal legislative decisions to federal court scrutiny. The distinction allows no basis for review of tribal court judgments claimed to be in excess of tribal court jurisdiction. In order to conclude that section 1331 jurisdiction based on federal common law is such a rarity that it did not include questions of the existence of tribal courts to exercise jurisdiction over non-Indians, the Ninth Circuit completely ignored the rationale for judicial recognition of a cause of action arising under federal common law, as expressed in cases that *it* has decided on this basis, and as expressed by this Court in *Illinois v. City of Milwaukee*, 406 U.S. 91, 99–100 (1972).[2] and ignored the

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[1] 28 U.S.C. §1331 provides for jurisdiction in the federal courts over civil causes of actions that arise "under the Constitution, laws or treaties of the United States."

[2] In the instant case, the Ninth Circuit did not discuss *Illinois v. City of Milwaukee*, which held that "laws" of the United States in 28 U.S.C. §1331 include claims based on federal common law.

rationale for federal review of claims by non-Indians that tribal jurisdiction doesn't exist. The distinction between tribal regulatory and tribal adjudicatory action now seen by the Ninth Circuit in its earlier decisions was a distinction imposed only in hindsight. The Ninth Circuit concocted artificial reasons for concluding that this Court's decision in *Oliphant v. Suquamish Indian Tribe*, 425 U.S. 191 (1978), does not recognize federal review of tribal court judgments claimed to be in excess of tribal court jurisdiction.

Also, the Ninth Circuit failed to note that federal question jurisdiction based on common law was defeated in *Milwaukee v. Illinois*, *supra*, only because Congress passed comprehensive federal legislation covering the cause of action in that case after the cause of action had been filed in federal court. In holding that there was no federal question jurisdiction, this Court did not depart from its earlier holding in *Illinois v. City of Milwaukee* that for causes of action relying on federal common law, when there is no applicable act of Congress, federal question jurisdiction exists. Contrary to the Ninth Circuit's suggestion that *Milwaukee v. Illinois* supports a bar to federal court jurisdiction in the instant case (Pet. App. 7a), this Court in Milwaukee restated its commitment to its earlier holdings that federal common law exists in areas of national concern, and is resorted to in the absence of an applicable act of Congress, when the court is compelled to consider federal questions that cannot be answered from federal questions alone. 451 U.S. at 314 [citations omitted].

Seemingly more than any other circuit court of appeals the Ninth Circuit has previously recognized that there is federal jurisdiction over challenges by non-Indians to the existence of tribal jurisdiction. This recognition by the Ninth Circuit has been free from distinction between

regulatory and adjudicatory power. The basis for the federal jurisdiction has been that challenges to the existence of tribal power present questions of the extent of tribal sovereignty and jurisdiction that involve analyses of federal treaties, statutes and case law, and are sufficiently federal in nature to invoke federal jurisdiction pursuant to 28 U.S.C. §1331. For instance, the Ninth Circuit allowed a federal forum for non-Indians' challenge to the Quinault Indian Tribe's power to exercise jurisdiction over non-Indians, in *Snow v. Quinault Indian Nation*, 709 F.2d 1319 (9th Cir. 1983), *cert. denied*, ____ U.S. ____ 104, S. Ct. 2655 (1984). Although the Ninth Circuit held against the plaintiffs on the merits, the court agreed with the district court's holding in *Snow* that the issue of the existence of the tribal power was a question that arose under federal common law such that federal question jurisdiction under 28 U.S.C. §1331 existed. 709 F.2d at 1321. In *Snow*, the Ninth Circuit correctly stated that federal question jurisdiction can be based on case law, relying on *Illinois v. City of Milwaukee*, *supra*, and held that "[as] Snow's action raises the issue of *tribal sovereign powers*, a sufficient federal question is presented upon which to base section 1331 jurisdiction." *Ibid.* In *Snow*, the Ninth Circuit also relied on *Oliphant v. Suquamish Indian Tribe*, *supra*, and *Montana v. United States*, *supra*, for the conclusion that there was federal question jurisdiction under section 1331. 709 F.2d at [1321]. *Oliphant* was initiated by a petition for *habeas corpus* by a non-Indian who questioned tribal sovereign powers by challenging a tribal court's criminal jurisdiction to try and punish him. It was that issue of tribal sovereignty in *Oliphant* that the Ninth Circuit recognized in *Snow* as creating federal questions jurisdiction. 709 F.2d at [1321].[3] There is no distinction

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[3] Now, in the instant case, the Ninth Circuit insists that the 1977

made in *Snow* between challenges to regulatory tribal power and adjudicatory power of tribal courts insofar as they present a federal question for federal question jurisdiction purposes. Neither of the cases cited by the Ninth Circuit in *Snow* in support of the existence of federal questions jurisdiction—*Illinois v. City of Milwaukee*, *Oliphant*, or *Montana* suggests that any distinction could exist between challenges to regulatory as opposed to adjudicatory jurisdiction of tribes for purposes of federal question jurisdiction.

Also, in *Muckleshoot Tribe v. Trans-Canada Enterprises*, 634 F.2d 474 (9th Cir. 1980), the Ninth Circuit had recognized the existence of section 1331 jurisdiction when questions of the tribal sovereignty and authority over non-Indians were raised by a non-Indians plaintiff. In *Muckleshoot*, the plaintiff did not plead section 1331 jurisdiction, and the case was dismissed on the jurisdictional grounds that were pled. However, the Ninth Circuit specifically instructed the distict court to grant leave to amend the complaint on remand. 634 F.2d at 476 n. 4. As with other relevant Ninth Circuit decisions prior to the instant case, there is absolutely no hint of any distinction between questions of tribal regulatory authority and questions of tribal adjudicatory authority over non-Indians for purposes of federal question jurisdiction. After its decision in *Muckleshoot*, the Ninth Circuit reaffirmed that the instruction to the district court to allow an amendment to

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decision of this Court in *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1977) (See part B, *Infra*), must be read together with *Oliphant* for the result that it was only the *habeas corpus* remedy sought in *Oliphant* that allowed for a federal forum, and that but for that peculiarity, there could have been no federal questions jurisdiction in that case. (Pet. App. 6a).

the complaint in *Muckleshoot* to include a section 1331 jurisdiction claim was an express recognition that challenges of tribal power over non-Indians presented a federal question for purposes of section 1331 jurisdiction, in *Babbitt Ford, Inc. v. Navajo Indian Tribe*, *supra*, 710 F.2d at 591. The specific challenge concerned a question of whether the Navajo Tribe has sovereign power to enact and enforce civil laws regulating the conduct of non-Indians who come into the reservaton to repossess vehicles. As with all of its cases dealing with this issue prior to the instant case, the Ninth Circuit failed to note any distinctions between federal court jurisdiction to consider adjudicatory and regulatory tribal power. In *Babbitt*, the Ninth Circuit discussed *Oliphant*, *supra*, in an analysis of the extent of the Navajo Tribe's sovereignty, 710 F.2d at 598, but did not take the opportunity in the discussion to suggest that the federal forum that considered the challenge to tribal court jurisdiction in *Oliphant* was available only because *Oliphant* came to the court on a petition for *habeas corpus*.

Nor did the Ninth Circuit note such a distinction in another case where it found federal question jurisdiction existed for a non-Indian's challenge to the existence of tribal authority over the non-Indian. *Cardin v. De La Cruz*, *supra*, In *Cardin*, the Ninth Circuit decided as a federal question the issue of whether the Quinault Tribe could enforce its economic and health and welfare regulations against a non-Indian grocer on the reservation. Again, it was the analysis of federal case law, statutes and treaties which determined the extent of tribal sovereignty. In perceiving a difference now, the Ninth Circuit ignores the fact *Cardin* was before the federal court on an action brought by a non-Indian seeking injunctive relief from the enforcement of a tribal court order obtained

against him by the tribe and seeking a ruling that such orders were beyond the tribe's jurisdiction.

In all of the Ninth Circuit cases decided prior to its decision in the instant case, the court analyzed the question of whether the challenged tribal authority over the non-Indian existed by analyzing the extent of tribal sovereignty in each case. That analysis involved detailed study of a tribe's inherent sovereignty and its possible divestiture by looking at the relevant treaties, statutes, executive policies, and federal case law on Indian questions. In each case, the Court's analysis followed the type of analysis used in *Oliphant*, *supra*, and in *Montana v. United States*, *supra*. In the referenced cases themselves, the Ninth Circuit had recognized that the same issues, questions and types of authority used by this Court in *Oliphant* and *Montana* were involved in the examination of the challenged tribal authority at issue over non-Indians. In fact, *Oliphant* and *Montana* seem to be the lodestar for the court's requisite analysis of tribal sovereignty in each case. *E.g.*, *Cardin*, *supra*, 671 F.2d at 366; *Babbitt*, *supra*.

The Ninth Circuit's conclusion that federal courts lack jurisdiction over the claim presented in the instant case is strained and erroneous. The analysis of tribal sovereignty that is part of every decision where federal courts accept jurisdiction over a non-Indian's challenge to the existence of tribal court authority involves a careful analysis of the source and extent of the sovereignty, based on a review of relevant statutes, treaties, executive policies and case law. The "federal interest in determining the extent of tribal sovereignty" was emphasized by the District Court in holding that federal question jurisdiction existed in the instant case. (Pet. App. 17a). This is the sort of analysis that is compelled by the question of the existence of tribal

jurisdiction over a non-Indian. It is the sort of analysis employed in part II *infra*, to examine the Crow Tribe's jurisdiction in the instant case. The question and analysis thereof are tailor made for federal common law, federal question jurisdiction.

Of course this Court has no obligation to follow decisions of the circuit courts, including the Ninth Circuit's earlier decisions, and that is not petitioners' suggestion in citing previous decisions of the Ninth Circuit. However, it is impossible not to notice that the analyses of tribal sovereignty in these cases are necessary to consider the existence or non-existence of tribal authority over non-Indians and are "spin-offs" of the *Oliphant* and *Montana* decisions. These examinations of tribal sovereignty, its origins, and whether it's been divested, are decided on the basis of federal common law. The sort of analysis required in this case, *Oliphant*, and in *Montana*, is precisely the sort of analysis that allows for federal question jurisdiction despite or because of the absence of any single federal statute or provision that defines the extent of tribal jurisdiction here.

B. Neither The Indian Civil Rights Act Nor This Court's Decision In *Santa Clara Pueblo v. Martinez* Bars Federal Court Jurisdiction Over Non-Indian's Challenges To Tribal Court Jurisdiction.

The Ninth Circuit declined to recognize any common law cause of action against Indian Tribes in addition to the remedy of *habeas corpus* available under the Indian Civil Rights Act of 1968, 25 U.S.C. §§1301–1303, based on an over-broad reading of *Santa Clara Pueblo v. Martinez*, *supra*. (Pet. App. 4a n.3, 6a, and 7a). In *Martinez*, a tribal

member sued tribal officials for carrying out a tribal ordinance that was allegedly unlawful under the Indian Civil Rights Act. This Court held that tribal members could not bring a civil cause of action in federal court against tribal officials carrying out acts on behalf of the tribe. The action was specifically described as an intra-tribal dispute, such that federal court jurisdiction would impair the ability of the tribe to govern itself. 436 U.S. at 59–62. The situation presented in *National Farmers Union* is not an intra-tribal dispute. Federal court jurisdiction would not impair the right of the Crow Tribe to govern itself. *Martinez* should not be read as a bar to federal court jurisdiction over the instant claim that the Crow Tribal Court acted beyond its jurisdiction. Nor does the Indian Civil Rights Act itself create a bar to federal question jurisdiction based on federal common law.

The Indian Civil Rights Act is codified in Title 25 of the United States Code. Title 25 governs affairs. Title 28 of the United States Code collects acts of Congress governing jurisdiction and the judiciary. The Indian Civil Rights Act should be codified in Title 28 of the United States Code if it is to be read as the jurisdictional bar that the Ninth Circuit sees it as being. There is nothing in the Indian Civil Rights Act itself that can be read as a bar to federal questions jurisdiction for an action by a non-Indian claiming that a tribal court has acted beyond its jurisdiction.

Nor does the *Martinez* decision bar federal court jurisdiction over the instant case. The doctrine of tribal immunity from suit that was used as part of the rationale for the jurisdictional bar in *Martinez* should be re-evaluated in relation to the circumstances of the instant case. Justice Blackmun recently commented that he "entertains doubts . . . about the continuing vitality in this day of the

doctrine of tribal immunity . . . ," and believes "that doctrine may well merit re-examination in an appropriate case." *Puyallup Tribe, Inc. v. Department of Game*, 433 U.S. 165, 178–179 (1977) (Blackmun, J., concurring). This is an appropriate case to re-examine any purparted bar to jurisdiction based on the tribal immunity doctrine relied on in *Martinez*. (43 U.S. at 59). *Martinez* did not consider the question presented here of whether actions challenging the existence of tribal court jurisdiction over non-Indians should be heard in federal court, when no intra-tribal disputes are involved. Nor did this Court offer an opinion on this question. *See* 436 U.S. at 53 n.4. The whole emphasis of this Court's language in *Martinez* was on the intra-tribal nature of that suit. This Court stated that the purpose of the Indian Civil Rights Act was to secure for the *American Indian* various rights and to protect *Individual Indians* from unjust acts of tribal governments. *Id.* at 61. This Court perceived that resolution of intra-tribal disputes concerning those rights of Indians would unsettle a tribal government's ability to maintain authority. *Id.* at 60.

In reaching its conclusion in *Martinez* this Court gave special emphasis to proposals that were rejected by Congress in its final draft of the Indians Civil Rights Act. The rejected proposals would have allowed federal court review of the actions of an Indian Tribal Court, when the court action deprived an Indian of important rights. 436 U.S. at 67, 68 and 68–69 n.26. The Court found the rejections of those proposals to show that Congress could not have intended causes of action to exist for the vindication of Indian's rights. All of the rejected proposals themselves and all of the testimony against them discusses only actions by or on behalf of Indians or tribal members. *Ibid.* This authority and reasoning would not apply to the in-

stant case. *Martinez* should be limited to its specific holding that there is no federal court jurisdiction to decide "intra-tribal controversies affecting matters of tribal self-government and sovereignty." *Id.* at 53. This court appeared to limit its holdings to that issue. *Id.* at 53 n.4. The instant case does not present a situation where federal court review would undermine that adjudicatory machinery established by the Pueblo for the resolution of intra-tribal disputes, and thus infringe in the right of the Indians to govern themselves." *Id.* at 59. The case here is not intra-tribal, and the bar of sovereign immunity of the *Martinez* case should not be extended as a broad doctrine barring federal court actions by non-Indians challenging the existence of tribal court jurisdiction.

Denying federal court jurisdiction over a challenge such as the one here, made by a non-Indian to the extent of tribal court jurisdiction, requiring a careful analysis of the federal common law that defines the extent of tribal sovereignty, is not justified by any of this Court's decisions. It would be a departure from this Court's and the Ninth Circuit Court's previous recognition of federal question, jurisdiction based on common law, and it would be unfair.[4]

II. The District Court properly held that under the facts of this case, the Crow Tribal Court was without jurisdiction over the Lodge Grass School District and that the Tribal Court Judgment was unlawfully entered.

[4] This month, the Navajo Tribe suggested to this Court that, at least in some cases, federal jurisdiction exists for challenges to Tribal power, saying that, "there is no reason to believe that if Tribal officers threaten actions arguably beyond the Tribe's power under federal law, the federal courts will not hear suits for injunctions just as they have in *[Kerr-McGee v. Navajo Tribe of Indians* (9th Cir. 1984, *cert. granted*, October 1984, No. 84-68), *argument pending]*. Brief of Navajo Tribe, *Kerr-McGee*, *supra*, at 45.

There is no basis in Federal legislation or in any treaty for subject matter jurisdiction being exerted by the Crow Tribal Court over a political subdivision of the State of Montana.

If this Court reverses the Ninth Circuit and thereby holds that petitioners do have a cognizable claim in Federal Court pursuant to 28 U.S.C. §1331, Judge Battin's thoughtful analysis of the undisputed facts of this case should be upheld. Respondents have never argued that any Congressional statute or Treaty expressly confers civil tort jurisdiction upon the Crow Tribal Court under the undisputed facts of this case. Therefore, whether Tribal Court jurisdiction should be sanctioned in this case depends upon whether, "the power has been retained by the Tribe as an element of inherent sovereignty even after the Tribal Nation became a quasi-sovereign within the exterior boundaries of the United States". *National Farmers Union Insurance* 560 F.Supp. at 215–16 (1983).

Montana v. *United States*, *supra* provides the analytical framework required to determine whether Tribal Courts may exercise civil jurisdiction over non-Indians as an incident of their retained sovereignty.

> To be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on the reservations, even on non-Indian fee lands. A tribe may regulate, through taxation, licensing, or other means, the activities of non-members who enter consensual relationships with the Tribe or its members, through commercial dealings, contracts, leases or other arrangements. A Tribe may also retain inherent power to exercise civil au-

> thority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the Tribe.

Montana at 565–66.

Petitioner Lodge Grass School District No. 27 exists through no consensual or proprietary arrangement with the Crow Tribe of Indians. It exists because Congress in the Crow Allotment Act of 1920, §16, *supra*, required the State of Montana to own land on the reservation provided it was used for public education and mandated that Montana thereby provide Indian children equal educational opportunities on the Crow Reservation. Thus Lodge Grass School District No. 27 is not a profiteer coming onto the Crow Reservation voluntarily subjecting itself to taxation or regulation of any other sort in return for the privilege of doing business. Hence, the sole focus of the correctness of Judge Battin's lower Court decision is whether his decision has threatened or adversely affected the political integrity, the economic security or the health and welfare of the Crow Tribe as a whole under the peculiar facts of this case.

In this connection, it is proper to point out one glaring difference between the Crow Tribal Codes and the Montana statutes governing sovereign immunity. In this connection, it is also meet to discuss the Montana statutes which deal with judgments against governmental entities and methods of satisfying those judgments. The Crow Tribe still embraces sovereign immunity. In other words, were the Lodge Grass School District No. 27 an arm of the Crow Tribe instead of a political subdivision of the State of Montana, respondents, Sage and Not Afraid, would have

been precluded from bringing their action in Crow Tribal Court.

The State of Montana, however, abolished sovereign immunity in its State courts in 1972 when its latest Constitution was ratified. Article II, §18 of the Constitution reads:

> The state, counties, cities, towns and all other local governmental entities shall have no immunity from suit for injury to a person or property, except as may be specifically provided by law by a 2/3 vote of each house of the legislature.

Section 2-9-311, MCA, provides that a State District Court has exclusive jurisdiction over tort actions brought against the State of Montana or any of its subdivisions. Section 2-9-318, MCA reads, "No levy of attachment or writ of execution shall issue against any property of a governmental entity for the security or collection of any claim . . .". Satisfaction of judgments rendered by State District Courts may be obtained only in conformity with Section 2-9-316, MCA which recites:

> A political subdivision of the state shall satisfy a final judgment out of funds that may be available from the following sources:
>
> (1) insurance;
>
> (2) the general fund or any other funds legally available to the governing body;
>
> (3) a property tax, otherwise properly authorized by law, collected by a special levy authorized by law, in an amount necessary to pay any unpaid portion of the judgment, except that such levy may not exceed 10 mills;
>
> (4) proceeds from the sale of bonds issued by a county, city, or school district for the purpose of deriving revenue for the payment of the judgment

> liability. The governing body of a county, city, or school district is hereby authorized to issue such bonds pursuant to procedures established by law. Property taxes may be levied to amortize such bonds, provided the levy for payment of any such bonds or judgments may not exceed, in the aggregate, 10 mills annually.

The Crow Tribal Court in entering its default judgment and then causing school property to be seized pursuant to its writ of execution, has thrown down the gauntlet. By seizing computers which serve as an integral part of the bi-lingual education programs of the Lodge Grass School District, the Tribal Court frustrated the State of Montana's solicitude for education without interruption due to the abolition of sovereign immunity.

The *Montana*, *supra*, analysis thus was most appropriate under the facts of the instant case. Judge Battin, who is uniquely familiar with local Indian concerns, rightfully concluded that, on balance, a single tort claim of an individual enrolled Tribal member did not involve any critical issue regarding the political integrity or economic welfare of the Crow Tribe as a whole. The evolution of the matter into a seizure of State property by the Tribal Court, however, has paralyzed the governmental duty of the State of Montana to provide quality education on the Crow Reservation. It is no wonder that Judge Battin tipped the scales in favor of the School District. This is especially so since Leroy Sage has every right to prosecute his claim in the courts of the State of Montana.

CONCLUSION

For the foregoing reasons, the judgment of the Ninth Circuit Court of Appeals should be reversed and Judge

Battin's judgment should be upheld given his careful analysis of the undisputed facts in this unique case.

Respectfully submitted,

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